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May 6, 1998

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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commissions
Office of the Secretary
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Ex Parte
CC: Docket No. 98-24 Application of AT&T Corp. and Teleport Communications Group, Inc. for Transfer of Control.

Dear Mrs. Salas:

On April 27, 1998, Ameritech filed reply comments in the above-captioned proceeding in which AT&T Corp. ("AT&T) and Teleport Communications Group, Inc. ("TCG") have applied, in connection with their merger, for FCC consent to transfer of control of certain international Section 214 authorizations and 38 GHz licenses currently held by TCG.[1] Ameritech -- which did not submit initial comments -- seeks to interject into this transfer of control proceeding belated and wholly extraneous challenges to certain past AT&T practices regarding the provision of space in AT&T's points of presence ("POPs").[2] Ameritech's new claim is procedurally improper, beyond the scope of this proceeding, and, in all events, substantively baseless. Because Ameritech's claim was raised for the first time on reply, however, the record contains no response. Accordingly, in order to ensure a complete record in this proceeding, AT&T respectfully submits this response.

[1] Reply Comments of Ameritech, Application of AT&T Corp. and Teleport Communications Group, Inc. for Transfer of Control (filed April 27, 1998) ("Ameritech Reply").

[2] The Commission has repeatedly "caution[ed] parties to avoid this practice" of "raising arguments for the first time in a reply that could have been raised in initial comments." Bell Atlantic Companies, 4 FCC Rcd. 1192, 1193 (1989). See also 47 C.F.R. § 1.45 ("The reply shall be limited to matters raised in the oppositions"); Dower v. Davis, 1987 WL 12847 at * 7 n.1 (D.D.C. July 28, 1987) ("it is improper to raise new arguments in a reply brief"); Kay v. FCC, 867 F. Supp. 11, 24 n.7 (D.D.C. 1994) (claims "improperly raised and cursorily addressed in Reply" fail to afford other parties "an opportunity to respond").

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Ameritech challenges AT&T's Shared Customer-Provided Access ("SCPA") policy, which governs arrangements for space in AT&T's central offices or points of presence with dedicated access providers seeking to place equipment in these "POPs." Ameritech complains that AT&T, beginning in 1994, required Ameritech to "bifurcate" facilities and maintain two separate spaces, one for "interconnecting dedicated access service provided to AT&T" and another for "interconnecting all dedicated access service provided to any customers other than AT&T." Ameritech Reply at 2. As a "remedy," Ameritech asks the Commission to grant it the relief that it seeks in its pending complaint proceeding against AT&T's SPCA policy before approving the transfer of control of TCG's licenses. Ameritech's claim should be rejected for at least three reasons.

First, Ameritech's apparent concern over AT&T's SCPA bifurcation policy has been rendered moot by subsequent events -- events certainly known to Ameritech at the time it filed its reply in this proceeding. In March 1998, AT&T informed Ameritech in writing that to settle Ameritech's allegations, AT&T would "allow the termination of Baseline, Coordinated and Total Service access circuits on shared equipment, whether the circuits are classified as interstate or intrastate."[3] Similarly, on April 22, 1998, in answering Ameritech's complaint to the Commission regarding AT&T's SCPA policy, AT&T stated that it has "determined to modify [its SCPA] policy by eliminating the restrictions that Ameritech's instant Complaint addresses."[4] Clearly aware of AT&T's commitments, Ameritech itself conceded in a filing in the complaint proceeding made on the same day as its reply comments here that AT&T has abandoned its SCPA policy. In its filing, made in defense of its refusal to answer interrogatories propounded by AT&T, Ameritech stated unequivocally that "AT&T has agreed to modify its SPCA policy to eliminate the bifurcation and condominium coaxial cable requirement aspects of that policy."[5] By Ameritech's own description, "the only issues that remain between the parties" are what charges are appropriate for SPCA and space, whether the charges should be tariffed, and "damages" Ameritech claims it suffered under the discontinued policies.[6] There can be no conceivable argument that resolution of those issues bears any relation whatsoever to the proposed transfer of control of TCG's licenses.[7]

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[3] See Illinois Bell Tel. Co., et al. v. AT&T Corp., File No. E-98-35, Verified Answer and Affirmative Defenses, Exhibit A at 1 (Letter of March 20, 1998 from William A. Davis, II, Esq., AT&T Corp. to Mark Ortlieb, Esq, Ameritech) ("AT&T Verified Answer") (submitted herewith as Attachment A); see also Illinois Bell Tel. Co., et al. v. AT&T Corp., File No. E-98-35, AT&T's Direct Testimony at 12-17 (Direct Testimony of Robert E. Polete, Jr. filed April 1, 1998) ("Polete Testimony").

[4] See AT&T Verified Answer, ¶ 67.

[5] Illinois Bell Tel. Co., et al. v. AT&T Corp., File No. E-98-35, Ameritech's Objections to AT&T's First Set of Interrogatories, at 1 (submitted herewith as Attachment B).

[6] Id.

[7] AT&T will respond to Ameritech's arguments on the merits of these issues as appropriate in the pending complaint proceedings. With regard to the damage claim, for example, AT&T explained in its Answer to the

(continued . . .)

In light of the record in the complaint proceeding currently pending before the Commission, it is clear that AT&T has discontinued the split equipment and "cable only" features of the SCPA policy of which Ameritech now complains here and that Ameritech was well aware of this fact prior to filing of its Reply Comments. Thus, Ameritech's Reply Comments are nothing more than a thinly veiled attempt to delay AT&T's ability to bring competition to the local market.

Second, like the "slamming" and "redlining" allegations levied by other commenters, Ameritech's SCPA allegations have nothing whatever to do with the proposed transfer of control of TCG's licenses. The Commission has repeatedly held that it "will not consider arguments in [transfer of control] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora[,]" and that Commission "complaint processes are available to those who believe that [the merged company] has violated . . . any applicable provision of the Communications Act." Memorandum Op. and Order, In re Applications of Craig O. McCaw and AT&T Co. for Consent to the Transfer of Control of McCaw Cellular Communications, FCC 94-238 ¶ 123 (rel. Sept. 19, 1994).[8] Ameritech itself recognized that its SCPA allegations are better addressed in other proceedings when it chose not to submit initial comments in this proceeding and instead to pursue complaint proceedings before the Commission and state commissions.[9]

Finally, Ameritech's cursory allegations of potential "vertical" harms arising from the integration of AT&T and TCG are entirely baseless. As AT&T and TCG explained in their reply comments (at 16-18), the merged companies will not have market power in any market, and "[v]ertical effects that harm competition generally depend on the vertically integrated firm possessing market power in an upstream 'input' market and taking actions in that input market that leverage this market power in the downstream 'end-user' market." Memorandum Op. and Order, In the Matter of the Merger of MCI Communications Corp. and British Telecomms., FCC

(. . . continued)

Ameritech Complaint that the SCPA bifurcation policy, far from being unreasonably discriminatory against Ameritech, was implemented in 1994 to "establish[] equivalent treatment among all providers of special access, including both [competitive access providers] and LECs such as Ameritech which had previously received preferential treatment in obtaining space." Answer at 15. Since 1994, competitive access providers have been required to pay "for the building space and power for their terminating equipment placed in AT&T's POPs[,]" a service traditionally provided for free to incumbent LECs including Ameritech. Id. at 14. Thus, in order to level the playing field, AT&T began requiring Ameritech and other LECs to pay for their space and power for any termination equipment placed in AT&T's POPs after March 1995. Id. at 15. The bifurcation policy of which Ameritech complains benefited Ameritech by "grandfathering" existing LEC equipment installed before AT&T began charging incumbent LECs. Id.

[8] See also Reply Comments of AT&T Corp. and Teleport Communications Group, Inc., Application of AT&T Corp. and Teleport Communications Group, Inc. for Transfer of Control (filed April 27, 1998) ("AT&T/TCG Reply Comments").

[9] Verified Complaint, Illinois Bell Telephone Co., et al. v. AT&T, E98-35 (filed April 2, 1998).

97-302 ¶ 154 (rel. Sept. 24, 1997). Ameritech hinges its contrary claim that the merged firm will have an increased incentive unreasonably to discriminate against other dedicated access providers solely on AT&T's ability to "obtain the access [AT&T] needs directly from TCG." Ameritech at 5. Of course, AT&T could obtain the very same access directly from TCG even before the merger. The critical fact, however, is that TCG cannot remotely provide all of the access services AT&T requires, before or after the merger. Rather, AT&T will remain primarily dependent on incumbent local exchange carriers like Ameritech to reach the vast majority of its long distance customers. Thus, unnecessarily raising incumbent providers' costs, as Ameritech posits, would harm AT&T by increasing the ultimate rates that AT&T pays Ameritech for total access service as well as the rates that baseline/ACF customers pay. These increased access costs would undermine AT&T's long distance competitiveness. In this regard, Ameritech, like Sprint, ignores that the merged firm's primary business will continue to be long distance.[10]

In short, Ameritech's reply comments are clearly improper and add nothing to the relevant public interest examination. The issues raised in Ameritech's reply are already being addressed in an independent Commission proceeding, and need not and should not be allowed to clutter this simple transfer of control application. The enormous competitive benefits of the AT&T merger with TCG are detailed in the applications and the record in this proceeding. There will be no offsetting competitive harms, and the Commission should accordingly approve the applications without delay.

Sincerely.

Betsy J. Brady

Attachments

cc: Counsel of Record

[10] Seeking to transform merger benefits into harms, Ameritech also ignores the benefits the merger will provide in the form of "one-stop shopping," (see AT&T/TCG Reply Comments at 22-23), focusing instead on its own inability to provide one-stop shopping. Ameritech Reply Comments at 6. But Ameritech can do so as soon as it has opened its monopoly local markets to competition and complied with the other requirements of the Telecommunications Act of 1996. See 47 U.S.C. § 271.

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISION
Washington, D.C. 20554

In the Matter of	)	
	)	
Illinois Bell Telephone Company	)	
Indiana Bell telephone Company,	)	
Michigan Bell Telephone Company,	)	
The Ohio Bell Telephone Company	)	
Wisconsin Bell, Inc.,	)	
	)	
Complainants	)	File No. E-98-35
	)	
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

VERIFIED ANSWER AND AFFIRMATIVE DEFENSES

Pursuant to Section 1.724 of the Commission's Rules, 47 C.F.R. § 1.724, AT&T Corp. ("AT&T") hereby submits this answer and affirmative defenses to the above-captioned formal complaint ("Complaint") of Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (collectively, "Ameritech"), and in support thereof alleges as follows:

Parties

1. AT&T lacks knowledge or information sufficient to admit or deny the allegations of paragraph 1 of the Complaint.

2. AT&T admits the allegations of paragraph 2 of the Complaint, except avers that the correct street address of its principal office is 295 North Maple Avenue.

Jurisdiction

3. AT&T denies the allegations of paragraph 3 of the Complaint, except admits that Ameritech purports to bring this action pursuant to Sections 206-209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 206-209, and refers the Commission to its First Affirmative Defense (¶¶ 49-53, infra).

4. AT&T denies the allegations of paragraph 4 of the Complaint, except admits that Ameritech filed complaints with the Illinois Commerce Commission ("ICC") and the Public Utilities Commission of Ohio ("PUCO") alleging that AT&T's Shared Customer-Provided Access ("SCPA") policy violates those states' laws and rules governing telecommunications services; admits that Attachment A to the Complaint is the Hearing Examiner's Amended Decision adopted by the ICC in the proceeding before that agency, and refers the Commission to said decision for its contents; and avers that Ameritech has voluntarily dismissed, with prejudice, its complaint before the PUCO on the grounds that the parties "hav[e] equitably settled the matters raised in its [c]omplaint" there.

Required Ameritech Documentation

5. AT&T denies the allegations of paragraph 5 of the Complaint, except admits that Ameritech has submitted the affidavit of Blaine C. Gilles, with exhibits, as Attachment B to the Complaint, and refers the Commission to those documents for their contents.

6. AT&T denies the allegations of paragraph 6 of the Complaint, except admits that Ameritech has submitted as Attachment C a certification in purported compliance with Section 1.721(a)(8) of the Commission's rules (47 C.F.R. § 1.721(a)(8)) allegedly describing its attempts to settle this dispute; avers that Ameritech's description of the parties' efforts at settlement are seriously incomplete and affirmatively misleading, and refers the Commission to paragraphs 66-74 (Fifth Affirmative Defense), Attachment C to this Answer, and AT&T's accompanying Motion to Dismiss for a full and accurate description of the parties' settlement efforts.

7. AT&T denies the allegations of paragraph 7 of the Complaint, except admits that Ameritech has submitted as Attachment D to the Complaint a listing of persons and documents, and the methods allegedly used by Ameritech to identify the same, in purported compliance with Section 1.721(a)(10) of the Commission's rules (47 C.F.R. § 1.721(a)(10)), and refers the Commission to said Attachment for the contents thereof.

8. AT&T admits that Attachment E to the Complaint purports to be a set of findings of fact, conclusions of law, and legal analysis in compliance with Section 1.721(a)(6) of the Commission's rules (47 C.F.R. § 1.721(a)(6)), and refers the Commission to said Attachment for the contents thereof, but denies the purported findings, conclusions, and legal analysis contained therein and refers the Commission to Attachment F to this Answer for AT&T's statement of proposed findings of fact, conclusions of law and legal analysis with respect to the matters alleged in the Complaint.

9. AT&T admits the allegations of paragraph 9 of the Complaint.

Ameritech's Pleaded Facts

10. AT&T admits that for certain periods since the Bell System divestiture Ameritech has provided interstate special access services to interexchange carriers ("IXCs") and other access customers pursuant to its Tariff F.C.C. No 2, but otherwise denies that the allegations of paragraph 10 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Affidavit of Robert E. Polete, Jr. (Attachment A)("Polete Affidavit") for a full and complete description of such matters.

11. AT&T denies that the allegations of paragraph 11 of the Complaint provide a full and complete

description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

12. AT&T denies that the allegations of paragraph 12 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

13. AT&T denies that the allegations of paragraph 13 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

14. AT&T denies that the allegations of paragraph 14 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

15. AT&T denies the allegation of the first sentence of paragraph 16 of the Complaint, and otherwise denies that the allegations of paragraph 15 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to

paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

16. AT&T admits that Attachment H to the Complaint is a letter dated October 24, 1994 from AT&T to Ameritech, and refers the Commission to said Attachment for the contents thereof, but otherwise denies that the allegations of paragraph 16 of the Complaint provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

17. AT&T denies that paragraph 17 of the Complaint provides a complete and accurate description of the contents of Attachment H to the Complaint, but otherwise admits the allegation of this paragraph.

18. AT&T denies the allegations of paragraph 18 of the Complaint, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

19. AT&T denies the allegations of paragraph 19 of the Complaint, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

20. AT&T denies the allegations of paragraph 20 of the Complaint, and refers the Commission to paragraphs

37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

21. AT&T denies the allegations of paragraph 21 of the Complaint; avers that allowing Ameritech to "us[e] . . . more efficient technology," by terminating all special access services in AT&T's POPs on equipment for which Ameritech does not pay for space and power, would have improperly conferred more favorable treatment on Ameritech than competing access vendors; and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

22. AT&T denies the allegations of paragraph 22 of the Complaint, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

23. AT&T denies the allegations of paragraph 23 of the Complaint, except admits that AT&T "grandfathered" from the application of its SCPA policy those baseline and access coordinated special access circuits installed by Ameritech prior to March, 1995, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

24. AT&T denies the allegations of paragraph 24 of the Complaint, except admits that it has not tariffed its SCPA charges insofar as they relate to interstate

special access circuits; avers that AT&T is not required to tariff such charges, for the reasons shown in its First and Second Affirmative Defenses (¶¶ 49-57, infra); and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

25. AT&T denies the allegations of paragraph 25 of the Complaint, except admits that access providers, including Ameritech, that propose to enter into an SCPA have been required to first execute a questionnaire describing their space needs and other pertinent information, and that AT&T thereafter specifies the applicable non-recurring and recurring charges for that SCPA (which in some cases have ranged between the amounts set forth in this paragraph of the Complaint); and refers the Commission to paragraphs 37-45, infra, and the accompanying Affidavit of Deborah Chandler (Attachment B) ("Chandler Affidavit") for a full and complete description of such matters.

26. AT&T denies the allegations of paragraph 26 of the Complaint; avers that any delays allegedly experienced by Ameritech have been due to its own failure to provide timely and complete information to AT&T and/or to agree promptly upon all terms of SCPAs arrangements requested from AT&T; and refers the Commission to paragraphs 37-45, infra, and the accompanying Chandler

Affidavit for a full and complete description of such matters.

27. AT&T admits the allegation of paragraph 27 of the Complaint that AT&T's SCPA policy has required Ameritech to use an electrical-coaxial cable connection in buildings occupied as condominium arrangements by AT&T and Ameritech; avers that there was no reason for Ameritech to enter into an SCPA for power and space in AT&T's POP where Ameritech has a central office in that same building, and that in such cases a "cable only" arrangement avoided unnecessarily consuming space in AT&T's POP and provided functionally equivalent service to an SCPA; and otherwise denies that the allegations of this paragraph provide a full and complete description of the matters alleged therein, and refers the Commission to paragraphs 37-45 infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

28. AT&T admits the allegation of paragraph 28 of the Complaint that AT&T has requested Ameritech to interconnect with it, for ACCU-Ring service, using a fiber connection in buildings occupied as condominium arrangements by AT&T and Ameritech, but avers that ACCU-Ring is not a baseline or coordinated access service, but rather a total service (under which AT&T provides space and power to Ameritech without charge); and otherwise denies that the allegations of this paragraph provide a full and complete description of the matters alleged

therein, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

29. AT&T denies the allegations of paragraph 29 of the Complaint, and refers the Commission to paragraphs 37-45, infra, and the accompanying Polete Affidavit for a full and complete description of such matters.

Causes of Action

Count I

30. AT&T denies the allegations of paragraph 30 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete and Chandler Affidavits, and its Third Affirmative Defense (¶¶ 58-61), infra.

Count II

31. AT&T denies the allegations of paragraph 31 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete and Chandler Affidavits, and its Third Affirmative Defense (¶¶ 58-61), infra.

Count III

32. AT&T denies the allegations of paragraph 32 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete Affidavit, and its Third Affirmative Defense (¶¶ 58-61), infra.

Count IV

33. AT&T denies the allegations of paragraph 33 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete Affidavit, and its Fourth Affirmative Defense (¶¶ 62-65), infra.

Count V

34. AT&T denies the allegations of paragraph 34 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete Affidavit, and its Second Affirmative Defense (¶¶ 54-57), infra.

Count VI

35. AT&T denies the allegations of paragraph 34 of the Complaint, and refers the Commission to paragraphs 37-45, infra, the accompanying Polete Affidavit, and its Third Affirmative Defense (¶¶ 58-61), infra.

Affirmative Defenses

As and for its affirmative defenses to the allegations set forth in the Complaint, AT&T respectfully avers as follows:

36. AT&T repeats and reavers paragraphs 1-35 as if fully set forth herein.

Types of Private Line Services

37. AT&T offers three service configurations to customers purchasing its interoffice channel ("IOC") private line service. Under the first configuration, referred to as "baseline" service, AT&T provides only the IOC between its POPs. The baseline customer, itself,

orders special access service directly from an access provider, such as a LEC or a competitive access provider ("CAP), to connect its locations to AT&T's POPs. Under the second configuration, referred to as an "access coordinated" arrangement, AT&T provides IOC service to the customer and also assists the customer in ordering special access from a LEC or a competitive access provider ("CAP") in the customer's own name to connect to AT&T's POPs. The customer is billed directly by the access provider and AT&T charges the customer for its access coordination function. Under the third configuration, often referred to as "total service," AT&T's customer orders end-to-end service from AT&T, under which AT&T provides IOC service and orders special access service from a LEC or a CAP in AT&T's own name to connect the customer's locations to AT&T's POPs and charges the customer for this entire service.

38. From an end user's perspective, total service is functionally and operationally distinct from baseline or coordinated access arrangements in several significant respects. Unlike the latter two service arrangements, in total service AT&T is accountable to the customer and bears responsibility for installation, maintenance, provisioning, billing, account maintenance and performance monitoring and standards for the end user's service.

39. AT&T has relied upon these important service distinctions in marketing total service to private line end users, but the SCPA policy has played no role in AT&T's efforts to differentiate itself in the private line services market. Significantly, despite Ameritech's claims that AT&T's SCPA policy unreasonably interferes with its ability efficiently to provide special access to baseline and coordinated access customers, Ameritech's tariff rates for DS0, DS1 and DS3 special access are in most cases lower than AT&T's corresponding charges to end users under Tariff F.C.C. No. 11.

Origin and Implementation of AT&T's SCPA Policy

40. AT&T provides Ameritech (and other LECs) with the building space and electrical power in AT&T's POPs necessary to terminate special access service for which AT&T is the customer-of-record in accordance with Ameritech's special access tariff. Under the LECs' special access tariffs, including Ameritech's, AT&T has been, and still is required, as those carriers' customer-of-record, to make such space and power available free of charge to the LECs.

41. From 1985 to 1994, AT&T was the customer-of-record for most special access service. Therefore, as an accommodation and for administrative convenience, AT&T also permitted Ameritech to terminate access to baseline and coordinated access customers -- which are Ameritech's special access customers -- without charge on the same

equipment housed in AT&T's POPs. Under these arrangements, AT&T thus received no revenues for providing space and power, and AT&T's total service end users were paying for such space and power used in connection with other end users' service, without receiving any attendant benefits.

42. Since 1994, AT&T has charged competitive access providers for the building space and power for their terminating equipment placed in AT&T's POPs for access service provided to baseline and access coordinated customers. AT&T has charged for these functions pursuant to inter-carrier contracts which are authorized by Section 211 of the Communications Act, 47 U.S.C. § 211. Under these arrangements, Ameritech and other LECs were thus receiving advantageous treatment which was not being afforded to other access providers.

43. Additionally, by 1994 AT&T's private line customers were requesting baseline and coordinated access services in increasing volumes. When Ameritech and other LECs provided AT&T with space demand forecasts that were substantially higher than any of their previous space projections, and which AT&T's analysis indicated was due to forecasted baseline and coordinated access demand increases, AT&T determined that continuation of its existing practice, allowing LECs to use space and power for all special access without charge, would exacerbate the differential treatment of access providers described

above, and would increase AT&T's costs without any corresponding benefit to AT&T's total service end users.

44. To place all access providers on an equal footing, AT&T determined that on a going-forward basis it would require all access providers to execute a Building Space License Agreement specifying recurring and non-recurring charges for space, power and support functions for equipment they place in AT&T's POPs to terminate baseline and coordinated service However, this SCPA policy allowed Ameritech and other LECs to use existing ("grandfathered") capacity to terminate access service to baseline and access coordinated customers at no charge. The policy also required that access providers pay for space, power and support functions for new terminating equipment installed after March 1995 which is used to provide baseline or coordinated service. AT&T's policy also required access providers to terminate special access for new baseline and coordinated access customers, which are non-AT&T customers, on separate equipment from the equipment used to terminate AT&T's end-to-end service. AT&T advised Ameritech in October 1994 regarding its plans for application of its SCPA policy.

45. AT&T's SCPA policy established equivalent treatment among all providers of special access, including both CAPs and LECs such as Ameritech which had previously received preferential treatment in obtaining space and power in AT&T's POPs. Additionally, under the SCPA policy

Ameritech, as the cost causer, assumed financial responsibility for space and power provided to its baseline and coordinated access service customers.

Required AT&T Documentation

46. In support of this Answer and Affirmative Defenses, pursuant to Sections 1.720(c) and 1.721(a)(5) and (a)(11) of the Commission's Rules (47 C.F.R. §§ 1.720(c), 1.721(a)(5) and (a)(11)), AT&T submits as Attachments A and B, respectively, the Polete and Chandler Affidavits.

47. Pursuant to Section 1.721(a)(8) of the Commission's Rules (47 C.F.R. § 1.721(a)(8)), AT&T submits as Attachment C a certification of its attempts to settle this dispute.

48. Pursuant to Section 1.721(a)(10) of the Commission's Rules (47 C.F.R. § 1.721(a)(10)), AT&T submits as Attachments D and E, respectively, a designation of persons believed to have first hand knowledge of the facts involved in this matter and a description of documents in AT&T's possession that are relevant to the facts alleged herein and the manner in which AT&T identified such persons and documents.

First Affirmative Defense

49. AT&T repeats and reavers paragraphs 1-48 as if fully set forth herein.

50. The provision of space and power by AT&T to LECs and CAPs to enable them to provide access service to

their customers out of AT&T's POPs is not a common carrier communications service subject to the Commission's Title II jurisdiction, nor is it incidental to a service provided by AT&T. AT&T's provision of these amenities is instead a real estate transaction.

51. Common carrier communications service must permit customers to "transmit intelligence of their own design and choosing." See National Assoc. of Regulatory Utility Commissioners, 533 F.2d 601, 608-09 (D.C. Cir. 1976). Space and electrical power, which are amenities AT&T offers in a building for carriers providing a service to non-AT&T customers, do not offer such a capability by themselves.

52. The Commission found in its Expanded Interconnection Order (7 FCC Rcd at 7444-46) that the incumbent LECs' central office space was "incidental" to the physical collocation service provided by the LECs, and that space and power could not be offered separately from physical collocation. The Commission therefore found that the provision of space and associated power was a common carrier communications service. See Expanded Interconnection Order, 7 FCC Rcd at 7444-46.[1] In

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[1] The D.C. Circuit later reversed and remanded the Commission's Order, finding that physical collocation does not involve "physical connection" of communications services under Section 201 of the Act, but instead constituted an allocation of property rights. Bell Atlantic v. FCC, 24 F.3d 1441, 1446

(footnote continued on following page)

contrast, AT&T's provision of space and power to providers offering access service out of its POPs is not incidental to the IOC service that AT&T provides to baseline and access coordinated customers. The space and power is a stand-alone offering.

53. Accordingly, AT&T's provision of space and power to access providers is not a common carrier communications service subject to Title II of the Communications Act.

Second Affirmative Defense

54. AT&T repeats and reavers paragraphs 1-53 as if fully set forth herein.

55. Even if AT&T's provision of space and power to access providers was a common carrier communications service, which it is not, AT&T is not required to tariff these functions. Section 211 of the Communications Act,

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(Footnote continued from prior page)

(D.C. Cir. 1994). The Commission found in the Interconnection Order that the 1996 Act does not displace its Expanded Interconnection requirements for incumbent LECs promulgated under Section 201 of the Communications Act, but that carriers seeking collocation for special access and switched transport now have a choice of negotiating an agreement with the incumbent LEC pursuant to Sections 251 and 252 or ordering expanded interconnection service pursuant to the LEC's interstate tariff. Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶¶ 567, 610-11 (rel. August 8, 1996).

47 U.S.C. § 211, expressly authorizes provision of common carrier communications service by a carrier, such as AT&T, to other carriers, such as Ameritech, pursuant to an intercarrier contract.

56. Moreover, pursuant to the Commission's Detariffing Order, the Commission will forbear from applying Section 203 tariff filing requirements to AT&T, as a non-dominant interexchange carrier, for interstate, domestic interexchange services. Order at ¶ 77. Therefore, to the extent that the Commission might find the provision of space and power to be a common carrier communications service provided by AT&T, it would not be required to be tariffed.

57. Accordingly, Ameritech's claim that AT&T has violated Section 203 of the Act should be denied.

Third Affirmative Defense

58. AT&T repeats and reavers paragraphs 1-57 as if fully set forth herein.

59. AT&T's policy has not unreasonably required Ameritech to deploy an inefficient network or resulted in stranded terminating facilities, as Ameritech contends. Under the policy, access providers have been required to install new, separate equipment to terminate baseline or coordinated access service only after existing, grandfathered capacity on their equipment is exhausted. This has enabled Ameritech to use the existing equipment to serve both AT&T and non-AT&T customers, and install

separate new equipment to serve non-AT&T customers when its customer demand exceeded the remaining capacity on the existing equipment.

60. Ameritech also claims that the Commission's Interconnection Order implementing Section 251 of the Act requires AT&T to facilitate Ameritech's deployment of an efficient network. The Interconnection Order set out the requirements with which an incumbent LEC must comply under Section 251 when it offers collocation, interconnection and unbundled network elements. Order at ¶¶ 628-29. Section 251 is inapplicable to the services AT&T provides to Ameritech for the latter's use with baseline and coordinated access customers.

61. If the Commission finds that AT&T's provision of space and power is a common carrier communications service, the SCPA policy was reasonable under Section 201. Moreover, Ameritech has failed to provide any legal basis for its claim that AT&T's policy violated Section 251. Accordingly, Ameritech's claims should be denied.

Fourth Affirmative Defense

62. AT&T repeats and reavers paragraphs 1-61 as if fully set forth herein.

63. Ameritech argues that customers ordering special access service from Ameritech would have to incur the space and power charge AT&T assesses to Ameritech while customers purchasing AT&T's end-to-end service would